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No. 05-493

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IN THE SUPREME COURT OF THE UNITED STATES

STEVEN ORNASKI, *Petitioner*,

v.

FERNANDO BELMONTES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
DONALD E. DE NICOLA
Deputy State Solicitor General
MARY JO GRAVES
Senior Assistant Attorney General
WARD C. CAMPBELL
Supervising Deputy Attorney General
MARK A. JOHNSON
Att. Supervising Deputy Attorney General
State Bar No. 179141
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-2960
Counsel for Petitioner

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THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDINGS IN *BOYDE v. CALIFORNIA*, 494 U.S. 370 (1990), AND *BROWN v. PAYTON*, 544 U.S. __, 125 S.CT. 1432 (2005)

Belmontes' opposition to the certiorari petition conspicuously sidesteps any discussion of the substance of this Court's *Boyde* and *Payton* decisions. Belmontes instead attempts to recast the circuit court's holding in terms of a fact-specific inquiry concerning "multiple, reinforcing and compounding instructional errors, which were not present in either *Boyde* or *Payton*." (Opp. 5.)

In this regard, Belmontes seeks to minimize the circuit court's overriding emphasis on the alleged constitutional deficiencies of California's "unadorned factor (k)" instruction. By focusing on the circuit court's subsidiary discussion about (1) the "special instruction" given in this case and (2) the trial court's allegedly improper responses to Juror Hern's questions during deliberations[1/], Belmontes attempts to distinguish *Boyde* and *Payton* because neither of those cases included these particular facts. (Opp 3-5.)

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1. As discussed in the opening petition for writ of certiorari, this complaint about the judge's responses to Juror Hern's questions was the sole basis of any claim of instructional error raised in the Ninth Circuit and, for that matter, was the only claim of penalty-phase instructional error raised in Belmontes' many years of federal habeas litigation.

Nothing in the Ninth Circuit's opinion suggests that its decision depended upon, or would have been any different but for, these ancillary matters. Under any rational reading, the Ninth Circuit's finding of instructional error turns on the "unadorned factor (k)" instruction's purported insufficiency in informing jurors they may consider "forward-looking" evidence of a defendant's future prospects in prison. App. 286a-295a. The discussion about the mid-deliberation colloquy with Juror Hern (which is Belmontes' primary point of distinction) merely supplements the circuit court's finding regarding the "unadorned factor (k)." In this regard, the Ninth Circuit concluded that the trial court's answers to Juror Hern served only to "[c]ompound[] the problems with the original and supplemental instructions...." App. 295a-299a.

As discussed in the petition for writ of certiorari, however, there simply was no "problem" to compound. As was true in *Boyde*, the jurors in this case would have reasonably understood the "unadorned factor (k)" instruction as permitting consideration of all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*, at 381-383. As was true in *Payton*, there is no reasonable chance that the jurors misinterpreted the "factor (k)" instruction to preclude consideration of "forward-looking" considerations based on probable post-crime behavior. *Payton*, at 1439-40. The jurors here would have realized, based on the "factor (k)" instruction alone, that they could consider evidence of Belmontes' character for good future behavior in prison as being an "inevitable" element of their sentencing determination. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).

Indeed, the "unadorned factor (k)" instruction provided more than constitutionally-adequate guidance about the "forward-looking perspective of future dangerousness," which–consistent with *Boyde* and *Skipper*–"is not independent of an assessment of personal culpability." *Johnson v. Texas*, 509 U.S. 350, 369-370 (1993).

In any event, Belmontes' protestations about the mid-deliberation colloquy with Juror Hern are unavailing. During this informal conference with the jurors, the court directed them to "go over the instructions again with one another." The trial court's directive to review the previous instructions would have cured any possible confusion. *See Weeks v. Angelone*, 528 U.S.

225 (2000) (no likelihood of confusion where the trial judge referred jury back to original instructions when the jury asked a question regarding the instructions themselves).

The previous instructions given in this case included the "unadorned factor (k)," which, as in *Boyde*, unambiguously informed the jurors that (1) they were to "consider all of the evidence which has been received during any part of the trial" and (2) they were to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Additionally, the previous instructions included the following "special instruction":

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

In his efforts to distinguish *Boyde* and *Payton*, Belmontes insists that this "special instruction" somehow compounded the "factor (k)" instruction's alleged deficiencies. It is true that no such "special instruction" was given in either *Boyde* or *Payton*. However, this "special instruction" certainly did not "compound" any alleged problem. To the contrary, under any rational reading this "special instruction" *further confirmed* that the jurors could consider *any* mitigating evidence in any way they saw fit. This "special instruction," therefore, rendered any chance of the jurors misinterpreting the "factor (k)" instruction, so as to preclude consideration of any relevant mitigating evidence, *far less likely* than was the case in either *Boyde* or *Payton*. Belmontes' efforts to distinguish *Boyde* and *Payton* serve only to highlight the circuit court's flawed Eighth Amendment analysis in this case.

Indeed, this Court in *Payton* found that the California courts reasonably rejected an almost identical challenge to the "factor (k)" instruction even where the prosecutor repeatedly and improperly argued, with no curative admonition from the trial court, that the jurors were *forbidden* from considering *any*

of Payton's evidence in mitigation. *Payton*, at 1437-39. Unlike in *Payton*, the prosecutor in this case expressly told the jurors that they could and *should* consider Belmontes' "forward-looking" evidence of future institutional adjustment.

As was true in *Payton*, any finding that "factor (k)" did not encompass Belmontes' forward-looking evidence would require the "surprising conclusion that remorse could never serve to lessen or excuse a crime." *Payton*, at 1439. "[L]ike in *Boyde*, for the jury to have believed it could not consider [such] mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all" *-Id.* at 1440.

As discussed in the petition for certiorari, the Ninth Circuit's finding to the contrary rests on illusory distinctions of *Boyde* and *Payton* and on an unreasonable review of the record. This Court's supervisory intervention is necessary to correct the Ninth Circuit's errant legal judgment in this case and to ensure that such a faulty interpretation of federal constitutional law will not extend to future cases.

THE NINTH CIRCUIT'S OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE v. LANE*, 489 U.S. 288 (1989)

Belmontes also insists that the Ninth Circuit's opinion does not rest on a new rule but, instead, was somehow dictated by precedent predating the finality of his judgment. As discussed, however, the circuit court's opinion clearly turns on the sufficiency of the "unadorned factor (k)," and there simply was no authority, extant at the time Belmontes' judgment became final, to question the constitutionality of that instruction or, for that matter, any similar instruction. There certainly was no precedent at the time Belmontes' judgment became final which would have dictated the conclusion reached by the Ninth Circuit in this case. *Stringer v. Black*, 503 U.S. 222, 227-29 (1992); *Butler v. McKellar*, 494 U.S. 407 (1990); *Teague*, 489 U.S. 288.

Belmontes' contrary argument rests entirely on authority dealing with the permissible scope of potentially mitigating evidence in capital cases.[2] None of those cases address the

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2. In support of this proposition, Belmontes cites *Eddings v. Oklahoma*, 455 U.S. 104, 112-117 (1982) and *Lockett v. Ohio*, 438 U.S. 586, 606-609 (1978), which both stand for the simple proposition that a state

constitutional requirements of jury instructions with respect to any such evidence. The first case on this point, *Boyde*, was issued *after* Belmontes' judgment became final (*see Belmontes v. California*, 488 U.S. 1034 (1989)), and that case *confirmed* the constitutional sufficiency of the very instruction at issue here.

Belmontes' cited cases, therefore, are all far too general to dictate, as per the controlling requirements of *Teague*, the alleged instructional error found by the circuit court in this case. *See Gilmore v. Taylor*, 508 U.S. 333, 343-344 (1993); *Sawyer v. Smith*, 497 U.S. 227, 235 (1990). Instead, the circuit court has interpreted these prior cases, explicating the overriding Eighth Amendment requirements of what a factfinder *may be allowed to consider* in capital cases, into an unpredictably "novel" constitutional mandate regarding what jurors must be told in their instructions. *Stringer*, at 228; *Butler*, at 414-15.

Belmontes seeks to distinguish *Boyde* and *Payton* to impose instructional requirements never contemplated in any controlling authority at the time his judgment became final. Such a requirement is not only inconsistent with *Boyde* and *Payton*, but it also violates the non-retroactivity doctrine of *Teague*. For this reason as well, Petitioner submits a writ of certiorari should issue in this case.

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may not affirmatively *prevent* a jury from considering relevant evidence in mitigation. Belmontes also cites *Skipper v. South Carolina*, 476 U.S. 1. As explained in the petition for certiorari, this case too merely involved the exclusion of mitigating evidence and did not address anything with respect

CONCLUSION

Accordingly, Petitioner respectfully requests that this Court grant the application for certiorari in this matter.

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Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MANUEL M. MEDEIROS
State Solicitor General

DONALD E. DE NICOLA
Deputy State Solicitor General

MARY JO GRAVES
Senior Assistant Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General

MARK A. JOHNSON
Asst. Supervising Deputy Attorney General
Counsel of Record
Counsel for Petitioner

drb
30085521.wpd
SA2006300169